

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF MICHIGAN  
SOUTHERN DIVISION

Patti Jo Cahoo, et al.,

Plaintiffs,

Case No. 17-10657

-v-

Fast Enterprises, et al.,

Defendants.

MOTION TO INTERVENE  
March 9, 2021

**BEFORE THE HONORABLE DAVID M. LAWSON**  
United States District Judge

HEARING CONDUCTED VIA VIDEO CONFERENCE  
ALL PARTIES APPEARING REMOTELY

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1	<u>TABLE OF CONTENTS</u>	
2	<u>MATTER</u>	<u>PAGE</u>
3	MOTIONS TO INTERVENE	
4	Argument by Mr. Ernst.....	7
5	Argument by Mr. Blanchard.....	13
6	Argument by Mr. Stidham.....	23
7	Argument by Mr. Rosenfeld.....	32
8	Argument by Ms. Taylor.....	41
9	Further Argument by Mr. Blanchard.....	45
10	Further Argument by Mr. Ernst.....	52
11	Ruling by the Court Taken Under Advisement.....	57
12	CERTIFICATE OF COURT REPORTER.....	58
13		
14		
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		

1 March 9th, 2021

2 2:54 p.m.

3 \* \* \*

4 THE COURT: Mr. Ernst, are you representing two of the  
5 three proposed intervenors?

6 MR. ERNST: Yes, your Honor. I'm representing  
7 Mr. Bell and Ms. Colvin.

8 THE COURT: On the docket Hannah Fieldstra is the only  
9 person that has appeared for those two individuals.

10 MR. ERNST: All right. Well, your Honor, she is in my  
11 firm, so generally speaking an appearance on behalf of one of  
12 the lawyers is an appearance by the firm, but I can file an  
13 appearance.

14 THE COURT: That is not correct with respect to the  
15 local rules of our court, so would you remedy that later on  
16 today?

17 MR. ERNST: I certainly will, your Honor.

18 THE COURT: Okay. Thank you.

19 And Mr. Blanchard, you have the other proposed  
20 intervenor?

21 MR. BLANCHARD: That's right, your Honor. I'm  
22 representing Ms. Heathcote.

23 THE COURT: All right. Well then, let's begin.

24 This is a session of the United States District Court  
25 for the Eastern District of Michigan being conducted via video

1       teleconferencing because the proceedings cannot be conducted  
2       in person without serious harm to public health and safety.

3               This is a motion hearing in the case of Cahoo versus  
4       Fast Enterprises, Case Number 17-10657.

5               Let's go through appearances first for the plaintiffs,  
6       please.

7               MR. ERNST: Good afternoon, your Honor. May it please  
8       the Court, Kevin Ernst appearing on behalf of the plaintiffs  
9       and on behalf of intervenors, Bell and Colvin.

10              THE COURT: All right. And for proposed intervenor,  
11       Heathcote?

12              MR. BLANCHARD: Good afternoon, your Honor. David  
13       Blanchard representing proposed intervenor, Heathcote.

14              THE COURT: And for Fast Enterprises?

15              MR. STIDHAM: Good morning, your Honor. Erik Stidham  
16       on behalf of Fast Enterprises.

17              THE COURT: Mr. Stidham, are you in your office?

18              MR. STIDHAM: I am, your Honor.

19              THE COURT: Well, it's afternoon here. So good  
20       afternoon.

21              MR. STIDHAM: Good afternoon, your Honor.

22              THE COURT: And for CSG?

23              MR. ROSENFELD: Good afternoon, your Honor. Stephen  
24       Rosenfeld on behalf of CSG.

25              THE COURT: And for defendant, Moffet-Massey?

1 MS. TAYLOR: Good afternoon. May it please the  
2 Court, Assistant Attorney General Debbie Taylor representing  
3 defendant, Moffet-Massey.

4 THE COURT: And for the other State defendants?

5 You're muted, Ms. Pendrick.

6 Ms. Pendrick, you're muted. Would you put your  
7 appearance on the record, please?

8 MS. PENDRICK: Sorry, your Honor.

9 Assistant Attorney General Kim Pendrick appearing on  
10 behalf of State defendants, Geskey, Mitchell, Bludell, and  
11 Singleton.

12 THE COURT: All right. We have three motions to  
13 intervene. Bell and Colvin we can take as one, and then I'll  
14 take the argument from Mr. Blanchard with respect to Heathcote,  
15 and then I'll let everyone respond who wants to respond, and  
16 then I'll entertain rebuttal arguments.

17 So Mr. Ernst, I understand that you have filed this  
18 motion to intervene on behalf of both of the individuals, I  
19 think one in August and one in September, which was before I  
20 made the determination on the class certification motion.

21 I think you have argued that under both the  
22 intervention by right and intervention by permission or  
23 permissive intervention prongs of the rule that you qualify.

24 The defendants have resisted the motion on a  
25 timeliness basis, but there also is another question, and that

1 is whether intervention would be futile because of the statute  
2 of limitations problem.

3 So I'll expect you to address all of that, if you  
4 please, so you may begin.

5 MR. ERNST: Yes, your Honor. If I may, I would like  
6 to start with the American Pipe argument first, the statute of  
7 limitations argument.

8 This case presents a narrow context in which, as the  
9 Court mentioned, that the intervenors filed their motions to  
10 intervene previous -- or prior to, I should say -- the Court  
11 determining the issue of class certification.

12 THE COURT: Well, what difference does that make now?

13 MR. ERNST: Well, there is -- okay. There is a case  
14 out of -- there is a case out of New Jersey which collects  
15 several district court cases. It's California Public Employees  
16 Retirement Systems versus Chubb Corp, and it's an unpublished  
17 case found at 2002 U.S. District Lexis 27189, and the  
18 propositions occurred mostly at pages 89 through 91.

19 THE COURT: Do you have a Westlaw cite for that?

20 MR. ERNST: I can get it shortly, your Honor, but I  
21 would have to go off screen to get it.

22 THE COURT: All right. Well, maybe you could get that  
23 when the others are arguing.

24 MR. ERNST: Oh, certainly.

25 THE COURT: But in any event, the -- and this is a

1 direct quote from the Court. And just before I begin the  
2 quote, they cite a case from Judge -- a published case from  
3 Judge Cleland from the Eastern District, Bromley versus  
4 Michigan Education Association, which is found at 178 FRD 148,  
5 Eastern District of Michigan 1998.

6 But anyway, the quote is as follows: "Several courts  
7 have held that American Pipe is appropriately applied to  
8 motions to intervene or amend complaints filed to substitute a  
9 proper class representative with standing prior to a decision  
10 on class certification." And then it goes on to cite several  
11 different cases that had agreed with that proposition.

12 THE COURT: Well, I don't think that's so much in  
13 dispute. In fact, the Seventh Circuit case, the Allstate case,  
14 basically says the same thing.

15 But I observe that the case you cited was from 2002,  
16 which was before the China Agritech case was decided by the  
17 Supreme Court, which sort of changes the landscape on this,  
18 doesn't it? Once the class cert motion has been denied, then  
19 this case is stripped of all its character as a class action,  
20 and now we have basically intervenors with the alternative  
21 of -- I guess it's not an alternative -- with the only remedy  
22 to be able to file the action on their own because of American  
23 Pipe tolling, but that's about it, isn't it?

24 MR. ERNST: Well, your Honor, China Ag did not deal  
25 with the situation of persons who filed motions to intervene



1 before the class cert motion was decided. So I think that it  
2 does not cover this particular context. And, in fact, they --  
3 the purpose -- one of the decisions, or holdings, I should say,  
4 in China Ag was that it dealt with successive actions and  
5 not -- not with intervenors who sought to intervene and file  
6 a renewed motion within the same action.

7 So I don't see China Ag as covering this particular  
8 context in this -- the particular facts of this case, and there  
9 is really not anything in China Ag that's similar to that.

10 And although I know that China Ag said something to  
11 the effect that additional class filings should be made early  
12 on, soon after the commencement of the first action seeking  
13 class certification, but then the Court went on to explain what  
14 it meant by that. And it said, "With class claims, on the  
15 other hand, efficiency favors early assertion of competing  
16 class representative claims. If class treatment is appropriate  
17 and all would-be representatives have come forward, the  
18 District Court can select the best plaintiff with knowledge of  
19 the full array of potential class representatives and class  
20 counsel."

21 While that concept might bar Mr. Blanchard's client  
22 because he's -- he would have a competing class representative,  
23 it doesn't bar our class -- our potential intervenors because  
24 they are not competing. In fact, the plaintiffs concur in  
25 their motions and they are represented by the same class

1 counsel.

2 So I just don't see China Ag as barring this  
3 particular circumstance. It didn't deal with intervenors  
4 and it didn't say anything about intervenors. So I don't  
5 see how that particular case essentially overrules sub silentio  
6 the line of cases that I cited in California Public Employees.

7 THE COURT: Well, other than the real party in  
8 interest issue, which was not the only reason that class  
9 certification was denied, how does -- how are your proposed  
10 intervenors on a different footing than the current class  
11 representatives?

12 And if they are not on any different footing, why  
13 would this not simply be another effort by different people  
14 to obtain class certification where the first one failed?

15 MR. ERNST: Well, they are on a different footing to  
16 the extent that they don't have the bankruptcy filings that  
17 potentially makes them not real parties in interest.

18 THE COURT: No, I understand that. But my question  
19 was, other than that. I mean, the class certification motion  
20 was denied not just on that basis, but there was a superiority  
21 issue and a management issue and other reasons why class  
22 certification was denied, and how would they propose to  
23 overcome that?

24 MR. ERNST: Well, because they were going to rely on  
25 the narrow class that the Court defined as potentially viable,

1 which is all the persons that never responded and that had an  
2 auto adjudication.

3 So they -- they would represent a different and more  
4 narrow class of the potential class -- putative class members.

5 THE COURT: All right. Go on, then.

6 MR. ERNST: All right. So with regard to the delay  
7 issue, the timeliness issue, if I could just give a brief  
8 timeline here, the motions to dismiss for lack of standing were  
9 filed in May of 2020, over three years after the case was  
10 filed. Discovery ended in June of 2020. Mr. Bell filed his  
11 motion to intervene in August of 2020 and Ms. Colvin in  
12 September 2020.

13 These potential intervenors did not know of their  
14 potential claims until Tony Paris, who represented them in  
15 their administrative proceedings before the UIA, contacted them  
16 and told them that they have potential claims and that the  
17 current class members may not be able to protect their claims  
18 because of the bankruptcy filings.

19 So within weeks after learning of their potential  
20 claims they filed their motions to intervene. And even had  
21 they -- but I should -- I'm sorry.

22 By the time they filed their motions to intervene, by  
23 the time they learned of their potential claims, discovery was  
24 already over. So I don't see how the -- there is any prejudice  
25 to the defendants.

1           And they have the same types of claims. There is  
2 no -- there is no additional litigation of the substantive  
3 issues that would be necessary in this case. We already  
4 litigated the issues of the auto adjudication and the failure  
5 to respond to questionnaires and/or notices of fraud  
6 determinations. We already litigated all those substantive  
7 issues.

8           So the length of time preceding the application for  
9 intervention from the time that they became aware of their  
10 potential claims was very short, and the prejudice to the  
11 original parties is very limited. This would not require much,  
12 if any, additional paper discovery, just maybe turn over the  
13 claims files of each one of these intervenors, and there might  
14 be one or two depositions that are required. So I don't see  
15 how there would be any substantial prejudice to any of the  
16 parties involved.

17           THE COURT: Mr. Ernst, anything further?

18           MR. ERNST: Your Honor, I would just like to point out  
19 one additional type of preemptive argument, and that concerns  
20 the case of McCune -- or McClune cited by Mr. Rosenfeld, which  
21 deals with an inability or the proscription against hearing  
22 deficient pleadings with a motion to intervene.

23           That whole case was premised on the fact that the  
24 plaintiffs' claims were dismissed based on standing. But in  
25 this case, the defendants' motion to dismiss plaintiffs' claims

1 based on standing was denied. Although it was denied without  
2 prejudice, it's nevertheless denied. So there is an existing  
3 case to which plaintiffs can intervene.

4 THE COURT: All right. Thank you, Mr. Ernst.

5 MR. ERNST: Thank you, your Honor.

6 THE COURT: Mr. Blanchard?

7 MR. BLANCHARD: Thank you, your Honor.

8 Intervenor Heathcote makes similar claims, has a  
9 similar position here, except that she is not related to  
10 counsel and shouldn't be imputed with any knowledge that the  
11 class representatives were inadequate unless and until the time  
12 in December when your Honor issued the class representation  
13 denial of class certification.

14 THE COURT: Well, the critical difference,  
15 Mr. Blanchard, isn't it that you didn't file your motion  
16 until after class cert was denied; right?

17 MR. BLANCHARD: Which we believe is the timely -- if  
18 we were -- I have the quote here. I can quote from our case,  
19 but really, "The commencement of the original class suit tolls  
20 the running of the statute of limitations for all purported  
21 members of the class who make timely motions to intervene after  
22 the Court has found the suit inappropriate for class action  
23 status."

24 So it is timely now, and it's not a time where she  
25 could protect her rights by sitting on her hands further, based

1 on representations that there are other adequate class members  
2 that might be able to intervene and other -- and would  
3 adequately represent the class.

4 THE COURT: Right. But this is no longer a class  
5 action.

6 THE COURT: That's right, your Honor.

7 THE COURT: So how do you deal with the situation  
8 that China Agritech basically removes from your quiver the  
9 class-action arrow so that the only thing you have left,  
10 really, is an individual action that you can file separately?

11 MR. BLANCHARD: Well, I don't agree -- I agree with  
12 Mr. Ernst, I don't agree with that proposition, your Honor.  
13 I believe China Agritech clearly dealt with successive actions,  
14 and there is nothing in a pending action that would prevent  
15 your Honor's discretion to reopen or renew or allow a renewed  
16 motion for class certification.

17 Really, that's the only way that we can proceed, given  
18 the nature of these claims. If you look at the three years  
19 of litigation that have gone on and the amount of time and  
20 resources that have put into it, could you imagine somebody  
21 that has \$10,000 or \$20,000 at issue doing this kind of work  
22 to uncover what was clearly a fraudulent, mismanaged, and  
23 unconstitutional adjudication process here? There's -- so that  
24 addresses your Honor's other question as to superiority, which  
25 was an issue in --

1 THE COURT: Well, let me go back a minute. You said  
2 that I have the discretion to reopen and revisit the class  
3 certification question.

4 What is the procedural device that you would rely on  
5 for that?

6 MR. BLANCHARD: Your Honor, we would file a motion for  
7 leave.

8 THE COURT: You can't ask for reconsideration. The  
9 time has expired for that type of a motion.

10 MR. BLANCHARD: Well, we don't believe those timelines  
11 apply to intervenors that have not intervened yet. Timelines,  
12 of course, and the case management orders are a matter of the  
13 Court's discretion. Once again, I think the vehicle would be a  
14 motion for leave to file a renewed motion for class  
15 certification.

16 THE COURT: Under what rule?

17 MR. BLANCHARD: I'd have to get back to you on that,  
18 your Honor, but the motion for leave --

19 THE COURT: The reason I'm asking, I'm not trying to  
20 fence with you, Mr. Blanchard, I'm trying to envision the  
21 procedural vehicle that would be at your disposal to allow a  
22 renewed motion for class certification at this stage of the  
23 case.

24 MR. BLANCHARD: I don't have anything further for you  
25 on that right now, except to say a motion for leave would be

1 within the discretion of the Court to grant, and particularly  
2 in a case where class certification was denied for adequacy  
3 reasons, and as your Honor mentioned, superiority reasons,  
4 which I want to talk about a bit. The only reasonable way to  
5 proceed would be to do that.

6 Now, if the Court -- we're talking about hypotheticals  
7 a bit here; right? We're thinking ahead to whether they are  
8 adequate class representatives, whether that's established in  
9 evidence, whether the Court wishes to entertain a motion for  
10 leave to file a renewed class certification. Even if not,  
11 Ms. Heathcote is entitled to intervene, especially given all  
12 the work that's gone in here. Her individual claim could not  
13 be feasibly pursued as an individual action. That's not a  
14 viable alternative.

15 THE COURT: Why not? Why not?

16 MR. BLANCHARD: The finances just don't work  
17 whatsoever.

18 THE COURT: Well, I mean, if all that's left to her  
19 is --

20 MR. BLANCHARD: It wouldn't even --

21 THE COURT: If all that's left to her is an individual  
22 action because class certification has been denied, then what  
23 difference if she files it as a separate action or intervenes  
24 as a separate plaintiff in this action?

25 MR. BLANCHARD: It would -- it would not be feasible



1 for counsel to recreate the work that's been done here for an  
2 individual claimant, and that's why Rule 23 was created and  
3 that's why the question of superiority is embedded within  
4 23(b) .

5 THE COURT: Oh, I'm sorry, I think we're talking past  
6 each other here, Mr. Blanchard. You're still on the class  
7 issue and I'm thinking that the only alternative is for an  
8 individual action.

9 Once -- I mean, that work has been done. The  
10 discovery is there. That ground has been plowed. So I imagine  
11 she can take advantage of that in her own individual action  
12 just by taking a look at the materials that have been on file  
13 with this court.

14 But anyway, you may proceed.

15 MR. BLANCHARD: For reasons that I discussed, I don't  
16 think an individual action is viable, and I'm sorry if we're  
17 talking past each other a little bit.

18 THE COURT: That's all right.

19 MR. BLANCHARD: But I don't think -- I don't think  
20 that we are so much, because the point that I'm trying to make  
21 is the only feasible way to proceed is under the Rule 23  
22 mechanism. If these types -- these are exactly the types of  
23 claims that should be treated under that mechanism, for people  
24 that have been oppressed by the State, that are low income,  
25 that have lost their jobs, and then have been subject to a

1 systematic procedure that would deprive them of due process,  
2 and yet the value of those claims is low or in question.

3 I think that's the policy reason why Rule 23 exists,  
4 for those cases where the class mechanism is superior. And  
5 that's why I'm saying I do believe it is superior in this case,  
6 especially for the narrower class that Ms. Heathcote could and  
7 would represent, and that's the only way to proceed with this.

8 She was subject to income spreading. I know there has  
9 been a lot of talk in the briefs and your Honor is aware of  
10 income spreading and how it happened. It essentially involves  
11 the agency's MiDAS system being programmed --

12 THE COURT: No, I'm familiar.

13 MR. BLANCHARD: -- to take that truthful information  
14 from the employer of a quarterly report and turn it into false  
15 information of weekly reports, and then to adjudicate somebody  
16 guilty of fraud because it doesn't match up with false  
17 information.

18 And so I think that's something that doesn't appear so  
19 much in the briefing, and the present case, that it's not clear  
20 that this actually is a system to create false evidence and  
21 then find people guilty of that, not merely of faulty mismatch,  
22 but they create a mismatch between apples and oranges because  
23 the computer turned an apple into an orange.

24 Otherwise, there is no evidence of fraud in which to  
25 adjudicate or find somebody guilty of fraud absent -- absent

1 the questionnaire. If they don't answer the questionnaire,  
2 the questionnaire says we will make an adjudication based on  
3 available information. There is no conflict between the  
4 truthful quarterly report from an employer and a truthful  
5 weekly report that employees/claimants are reporting when  
6 they are getting benefits. There is no conflict in that  
7 information.

8 That's the only existing information the agency has,  
9 but they programmed the computer to create false information as  
10 if the employer reported those weekly earnings. And I'm sorry  
11 to repeat ground that's already been plowed, as your Honor  
12 mentioned, but I do believe it's important to keep that in  
13 mind.

14 And Ms. Heathcote -- although I'm not aware of the  
15 other intervenors' position, Ms. Colvin was not part of the  
16 income spreading, I don't believe, and Mr. Bell was or may  
17 have been -- but Ms. Heathcote uniquely comes to you with the  
18 direct evidence of a batch adjudication from start to finish  
19 based solely on an income spreading. And that's -- it can  
20 be verified from the records, and it can be put into a  
21 spreadsheet, and those people can be identified, and the  
22 violation exists as a matter of policy and practice, and  
23 that's why the class mechanism would be superior.

24 Or if the case were to proceed and it's only for a  
25 few plaintiffs, she might as well be part of this case rather

1       than some other -- trying to recreate the wheel.

2               I have personally got a stake in this because, you  
3       know, like Tony Paris apparently reached out to a client that  
4       he represented before, I reached out to a client that I  
5       represented before, as of December when the class certification  
6       was denied, because I represented her during these robo-fraud  
7       years and I worked to reverse that determination, but also  
8       because I litigated the Zynda case and I worked to reverse  
9       those determinations of 20,000, 40 -- 20,000-plus people who  
10      were robo adjudicated in that system.

11              And in the meanwhile, other counsel have filed  
12      additional cases to recover what -- the damage that was done,  
13      aside from the equitable relief that was gained in Zynda for  
14      the actual monetary damage that was done to the people out  
15      here. And I applaud that and I have been willing to sit back  
16      and grateful for all the people that are willing to come  
17      forward and pursue this on behalf of the tens of thousands of  
18      people that were defrauded by an intentional robotic system.

19              THE COURT: Mr. Blanchard, in Zynda, weren't all of  
20      the claimants and class members made whole with respect to what  
21      the State took from them as opposed to any other consequential  
22      damages?

23              MR. BLANCHARD: They were not made whole. They  
24      were -- under the Zynda settlement and review, they were --  
25      most all of them have, at this point, been -- had their money

1 returned that was unlawfully seized from them, but that -- I  
2 would not argue that that made them whole at all.

3 And just to talk a little bit more about that, the  
4 Zynda action was on behalf of representative plaintiffs and  
5 institutional plaintiffs. It wasn't a putative class as we're  
6 talking about here. So the settlement was between those six or  
7 seven individual plaintiffs and a couple of institutions and  
8 the State, the agency.

9 THE COURT: All right. I guess I used the term  
10 "class" carelessly --

11 MR. BLANCHARD: It was class relief, we can say that.

12 THE COURT: -- with that group. But, for example, if  
13 an individual was wrongfully adjudicated as having committed  
14 fraud and an income tax refund was intercepted by the State,  
15 wasn't all of that returned as a result of the Zynda  
16 settlement?

17 MR. BLANCHARD: For the class that we're talking  
18 about, yes, predominantly, yes, there were. What wasn't  
19 included in the Zynda settlement were people that were -- who  
20 filed bankruptcy and had already been adjudicated in that  
21 system.

22 THE COURT: Yeah.

23 MR. BLANCHARD: Or people who had appealed their  
24 unemployment claims and been found later guilty of fraud. But  
25 for those that were robo adjudicated, it was reviewed and, as I

1 understand it at this point, there is some money that has  
2 still not been returned because people could not be found, but  
3 upwards of \$20,000,000 that was returned.

4 THE COURT: So what's the nature of your client's  
5 claim, or the nature of your client's damages, let me put it  
6 that way?

7 MR. BLANCHARD: Well, I mean, to be blunt with you, I  
8 think they are pedestrian in nature, and that's why they are  
9 common. They share a commonality with a lot of the people that  
10 were victims of this kind of fraud.

11 THE COURT: Well, describe them for me, please.

12 MR. BLANCHARD: Well, she didn't find out about this  
13 fraud determination until she became unemployed again. And  
14 she went into the office, which coincidentally had to be --  
15 it occurred around the same time that the fraud adjudication  
16 occurred, and she was denied benefits at that time or delayed  
17 benefits at that time because there was a fraud adjudication  
18 in that benefit year. So once somebody is found guilty of  
19 fraud, they are unable to access the system when they need it  
20 most for unemployment benefits.

21 THE COURT: Did she ultimately get her benefits?

22 MR. BLANCHARD: She did ultimately get her benefits.

23 THE COURT: And so what's her pecuniary loss here? I  
24 mean, characterize it any way you'd like. I'm just trying to  
25 get a handle on it.

1 MR. BLANCHARD: Well, there's certainly emotional  
2 distress. There's legal fees that she invested in getting this  
3 reversed, which took six months or more to get to a hearing.  
4 Not six months of work, but six months to get to a hearing and  
5 get that fraud determination reversed. There is the time value  
6 of money and the delay in receiving benefits that affected a  
7 lot of people and affected her, and really, at the crux of what  
8 unemployment benefits are for.

9 And so I think that that loss of time is -- should be  
10 looked at differently than somebody that loses a percentage of  
11 money out of their bank account or something else. We are  
12 talking about social safety net money that people -- that is  
13 supposed to be there on that first week or second week after  
14 you suddenly lose employment, and that's for a good public  
15 policy concern there. It's not supposed to be something that's  
16 recovered later on.

17 THE COURT: Yeah, okay. I understand. You have  
18 answered my question. I appreciate the explanation.

19 Any further argument, Mr. Blanchard?

20 MR. BLANCHARD: Unless -- I'll save -- I'll save my  
21 time for rebuttal. Thank you.

22 THE COURT: Okay. Mr. Stidham, please.

23 MR. STIDHAM: Thank you, your Honor.

24 First, if I could, I would like to address China  
25 Agritech, because I do think it cuts against both group of

1 intervenors. And then my intent, your Honor, would be also  
2 to touch on futility and timeliness in that.

3 First --

4 THE COURT: Well, first of all, would you address,  
5 Mr. Ernst's argument that he is on a little bit of a different  
6 footing, and because he filed his motions before the class  
7 certification ruling he is in a different position than a  
8 newcomer, for example, that wants to start a new class action  
9 altogether?

10 MR. STIDHAM: Yes, your Honor.

11 I don't think he is on this -- he is on different  
12 footing for this reason: The citation from China Agritech that  
13 I understand Mr. Ernst to be relying on, I think, is conflating  
14 tolling and timeliness.

15 China Agritech stands for the proposition that once a  
16 decision is made on certification and there is no carveout  
17 indicated for folks who filed their motion either before or  
18 after that certification ruling in that case, but once the  
19 ruling is made on certification then the class claims, as  
20 opposed to the individual claims, are untimely, but the  
21 individual claims have, in effect, been tolled.

22 And that then, I think, your Honor, that distinction  
23 is reflected in the language that I believe Mr. Ernst cited and  
24 I believe that Mr. Blanchard also relies upon which talks in  
25 terms of timely moving to file a case or to intervene.



1           Both -- that language is talking about moving after  
2           the certification decision to file your claim in an individual  
3           capacity either in a new claim or seeking intervention.  
4           And when one seeks intervention, not, again -- again, not  
5           intervening to assert a class claim but an individual claim,  
6           then they need to meet all the standard requirements for  
7           intervention.

8           And I will admit that the case that Mr. Ernst was  
9           reading out of Westlaw, we did not have a chance to review or  
10          analyze, but based on how he has characterized it and based  
11          on --

12          THE COURT: I think it was Lexis, actually, and  
13          Mr. Ernst is supposed to be looking up the Westlaw cite for  
14          me now.

15          MR. STIDHAM: But your Honor, I hadn't seen that case  
16          before or looked at it, and so all I am going on, your Honor,  
17          is based off of how it was characterized by Mr. Ernst.

18          It sounds to me that the characterization is again  
19          focused on that difference that I just pointed out about  
20          individual claims versus class claims, and there is no  
21          distinction, again, in China Agritech that makes that  
22          distinction.

23          And it simply, you know, wouldn't make sense, your  
24          Honor, because what China Agritech was getting at by making a  
25          distinction between class claims and individual claims was

1 getting over this endless cycle of -- excuse me -- to both  
2 address the issue of individuals who relied upon the class  
3 claim but also the competing need to move forward with regard  
4 to the class action and avoiding this endless cycle of class  
5 actions being filed one after another based on the tolling.

6 And what Mr. Ernst has talked about here is not --  
7 there is no distinction that advances the concept behind China  
8 Agritech that would be advanced by recognizing this distinction  
9 that Mr. Ernst is moving forward on.

10 And, your Honor, I am happy to continue to try and  
11 address that if there are some more questions on that, but  
12 I think that segues also into the fact that Mr. Ernst's  
13 clients, even if they did file before this Court's ruling  
14 on certification, they still need to meet the timeliness  
15 requirements to intervene. There is no out or free pass for  
16 meeting that hurdle.

17 THE COURT: Oh, are you referring to timeliness from  
18 a statute of limitations standpoint or from an intervention  
19 standpoint?

20 MR. STIDHAM: Intervention, your Honor. I think there  
21 is -- in the intervention. So even if -- even if this was  
22 filed before the certification, if we move away from China  
23 Agritech --

24 THE COURT: I get it.

25 MR. STIDHAM: -- he has still got to meet his

1 obligations, which here, you know, we have got -- and it's  
2 laid out in the briefing, your Honor, I won't belabor it too  
3 much -- but we have got the same lawyers, the same individuals,  
4 they are charged with knowledge, and they just sat on this for  
5 years.

6 And this assertion that Mr. Ernst is making about  
7 the timing or the filing of the motions to dismiss based on  
8 standing, he was on notice through the affirmative defenses  
9 asserted by CSG. He was on notice by the depositions. All of  
10 this is set out, your Honor -- and again, I hesitate to belabor  
11 it -- in a number of briefs, and the Court is aware of how  
12 longstanding that issue was there.

13 And, your Honor, in addition to simply that timeliness  
14 issue, futility is a factor for both Mr. Ernst's clients and  
15 Mr. Blanchard's clients, because they are not seeking to  
16 intervene in this case just to assert individual claims. They  
17 are seeking to intervene to assert class claims.

18 They've both made it very clear in their briefing, and  
19 I think they have made it clear in oral argument here, that  
20 what we're talking about are efforts by this group -- but these  
21 group of individuals to try and take another shot at class  
22 certification.

23 And despite Mr. Blanchard's characterization of  
24 this Court's ruling as being one based on adequacy, that is  
25 certainly not our reading. There was a very broad rejection of

1 certification under these individual facts for a broad variety  
2 of reasons, and neither Mr. Ernst's characterization of these  
3 clients or Mr. Blanchard's characterizations of his clients do  
4 anything to address the certification issue here.

5 This Court denied -- well, let me take it in  
6 categories. Mr. Ernst seems to assert that because he is  
7 bringing forth these clients that do not have bankruptcy issues  
8 that they are somehow going to help the certification cause if  
9 this Court were somehow to revisit it. That's not the case.

10 This Court went through the analysis, found and  
11 characterized what potentially was a commonality question, and  
12 then found typicality, adequacy, superiority, and predominance  
13 issues for the defendants for whom there were no bankruptcy  
14 issues because of the individualized facts inherent regarding  
15 notice and the other components that this Court and all the  
16 attorneys on this have gone through in great detail.

17 THE COURT: You mean to say for the plaintiffs for  
18 whom they have no bankruptcy issues?

19 MR. STIDHAM: Yes. That the Court found that even for  
20 those plaintiffs for whom there were no bankruptcy issues, the  
21 problems with certification persisted; therefore, your Honor,  
22 Mr. Ernst's representation that these two proposed intervenors  
23 that he is presenting don't have bankruptcy issues, that does  
24 not advance the ball at all. It does not address the issues  
25 that existed and caused there to be a denial for certification.

1 Nor does Mr. Blanchard's proposed intervenor do  
2 anything to address the issues that resulted in a denial of  
3 certification. Mr. Blanchard characterizes his client as  
4 having had an adjudication based on income spreading, while  
5 we already had a plaintiff who raised that issue, and that  
6 didn't get across the line for certification.

7 And then also, your Honor, and I apologize for  
8 diverting a little bit to this quickly, but neither of the --  
9 none of the proposed intervenors in here provides -- provided  
10 proposed pleadings in any detail. And that really puts the  
11 defense at a disadvantage.

12 But what we do see and what Mr. Blanchard has  
13 characterized is that his client not only had this income  
14 spreading issue that he was talking about, but was denied based  
15 on a failure to provide a responsive form, which was the issue  
16 that ran across all of the other plaintiffs, your Honor, at the  
17 time you made the certification issue.

18 This plaintiff changes nothing about that, and that  
19 all of those individuals, your Honor, that you addressed  
20 who had failed to provide the forms, that's what led, to our  
21 understanding, this Court into its analysis of the typicality  
22 issues, the superiority issues, and the other issues that  
23 resulted in a denial of certification.

24 So the proposed intervenor that Mr. Blanchard is  
25 bringing forward does not advance the ball at all. It's just

1 another issue of futility. And Mr. Blanchard, I know he raised  
2 the word "superiority," but he did not go through the analysis  
3 or match that up with the type of findings that this Court's  
4 reached on the superiority and predominance issues.

5 And there is no indication that if -- even if the  
6 China Agritech was ignored, from our perspective, if there was  
7 some justification for his clients to come in here, it would be  
8 futile to achieve the only objective that is really being  
9 sought here, your Honor, which is to revisit the class  
10 certification.

11 And finally, your Honor --

12 THE COURT: Well, what's your position, Mr. Stidham,  
13 on whether they should be allowed to intervene to assert  
14 individual claims?

15 MR. STIDHAM: I think it's untimely, your Honor. You  
16 know, we do -- as the Court rightly --

17 THE COURT: So same arguments with respect to the  
18 other factors?

19 MR. STIDHAM: Same arguments. And, your Honor, I  
20 would touch upon this one, which I don't think I have  
21 addressed, which would be prejudice. We heard both counsel  
22 talking in terms of no prejudice to the defendants because, you  
23 know, there would need to be work on these claims even if they  
24 were brought in separate actions. That's not the appropriate  
25 analysis under intervention as to whether or not there is

1       prejudice or delay. You look within this case.

2               It would always be the case that a party would be able  
3       to meet that standard if they said, "Hey, if I file a separate  
4       case it's going to create work."

5               And I would point the Court to the Lindholm case from  
6       the Ninth Circuit that we cited which goes into, I think, some  
7       detail on that. And the reason I highlight that Court -- that  
8       case, your Honor, even though it's in the Ninth Circuit, in  
9       addition to addressing this and rejecting this argument that  
10      because another case could be filed there is no basis to assert  
11      either delay or prejudice in this case, in an addition to doing  
12      that, that case looked in particular at this argument that's  
13      being raised that somehow intervention is different for  
14      purposes of tolling of a statute of limitations than it would  
15      be in filing a separate case.

16              And that's the one case, your Honor -- again, in the  
17      Ninth Circuit -- but that's the one case which we believe is on  
18      four -- on all fours with the argument that Mr. Blanchard is  
19      asserting with regard to intervention somehow being different  
20      for purposes of the statute of limitations when it comes to  
21      China Agritech.

22              And the Ninth Circuit is simply following the logic  
23      that it would make no sense to set out the principle that  
24      is driving China Agritech and create this loophole for  
25      intervention.

1           And so, your Honor, I would just direct the Court's  
2           attention to that one.

3           THE COURT: I have got it here -- no, I don't. Just  
4           give me the citation so I can review it again, please.

5           MR. STIDHAM: Certainly, your Honor. It's the  
6           Lindholm case, and it is 2019 Westlaw 4640684. And the  
7           discussion, your Honor, is at \*7 that we would highlight.

8           THE COURT: Okay. Thank you, Mr. Stidham.

9           MR. STIDHAM: Thank you, your Honor.

10          THE COURT: Anything further?

11          MR. STIDHAM: No, your Honor. Thank you.

12          THE COURT: Mr. Rosenfeld?

13          MR. ROSENFELD: Thank you, your Honor. Let me also  
14          start with the China Agritech and American Pipe issue, because  
15          I think that those are critical here, and I will also then  
16          discuss the untimeliness.

17                 First, let me back up for a second, and because I  
18          think that it's important to understand that both American Pipe  
19          and China Agritech were really very policy-driven decisions by  
20          the Supreme Court.

21                 American Pipe, in American Pipe the Supreme Court held  
22          that individual statutes of limitation were tolled pending  
23          the -- pending the pendency of a class certification motion  
24          because they wanted to protect the Court's docket from an  
25          onslaught of individual suits seeking to preserve statutes of



1 limitation while that motion was pending.

2 Likewise, China Agritech was also policy driven. The  
3 Supreme Court protected both litigants and the courts from  
4 unending potentially decades of litigation that would result  
5 from serial class actions if the statute of limitations were  
6 tolled for class claims as well as the individual claims.

7 So the Court in China Agritech was very clear that  
8 while individual claims are tolled while a class action is  
9 pending, class claims were not.

10 And let me back up a second before I go further and  
11 talk about the specific application. But if you look at  
12 American Pipe, it's important to understand, particularly for  
13 purposes of this case, that while the Supreme Court was clear  
14 that the statute of limitations was tolled, that did not affect  
15 the timeliness aspect of intervention.

16 In fact, Justice Blackmun very specifically, in  
17 his concurrence to the American Pipe decision, stated that  
18 intervention even post class certification, when the statute  
19 of limitation wasn't an issue, could still be denied if the  
20 District Court, in its discretion, concluded that intervention  
21 would unduly delay or prejudice the adjudication of the rights  
22 of the original parties.

23 THE COURT: Yeah, but that has nothing to do with  
24 China Agritech, does it?

25 MR. ROSENFELD: It does not.

1           THE COURT: All right. Well, let me ask you a  
2 question about the application of that constriction that  
3 China Agritech basically ushered in or clarified, however you  
4 want to characterize it.

5           Would this motion or would your argument be different  
6 if it were to take place before I decided the class  
7 certification issue?

8           In other words, would China Agritech have any impact  
9 whatsoever on this?

10          MR. ROSENFELD: I don't believe so, your Honor. If  
11 these -- if --

12          THE COURT: Well, I guess I asked a compound question.  
13 So your answer --

14          MR. ROSENFELD: Let me explain.

15          THE COURT: Let me object and sustain on my question.

16          Would the argument be any different if the motion were  
17 presented before I decided the class certification question?

18          MR. ROSENFELD: I think it would be, which is why, in  
19 response initially to Ms. Colvin and Mr. Bell's motions, we did  
20 not raise China Agritech. And I think if you look at --

21          THE COURT: Well, if that's the case, Mr. Rosenfeld,  
22 shouldn't Mr. Ernst's motion be looked at as if class  
23 certification hasn't been decided yet, since he filed the  
24 motion before I made the decision?

25          MR. ROSENFELD: I don't believe so, your Honor.

1 THE COURT: Tell me why.

2 MR. ROSENFELD: Because Mr. Ernst filed his motion  
3 at his own peril, and I'll tell you why.

4 Mr. Ernst, who represents the plaintiffs here, and who  
5 represents both of the two intervenors, knew full well about  
6 the claims in this case and the affirmative defenses that  
7 the -- that the parties were making. In fact, CSG made an  
8 affirmative defense on real party in interest, which is why  
9 he wanted to bring the claim at the very outset of the case.

10 Mr. Ernst -- and there is a case, and we cite it in  
11 our brief, your Honor, it is Clark versus Baptist Memorial  
12 Healthcare, it's 427 F. App'x 431 at 433 to 35, it's a 2011  
13 Sixth Circuit case, and it said when an intervenor has the same  
14 counsel as the named plaintiff whose adequacy in representing  
15 the putative case is called into question, the intervenor has a  
16 duty to move for intervention immediately. He is charged with  
17 the knowledge of that counsel.

18 And so what happened here? Mr. Ernst stood on the  
19 sidelines with these intervenors during years of discovery  
20 until there were motions to dismiss filed, there were motions  
21 for summary judgment filed, there were -- and even -- what's  
22 interesting is, if Mr. Ernst was so concerned about this Court  
23 taking up intervention before class certification, he should  
24 have filed the intervention before he filed the motion for  
25 class certification.

1           A motion for class certification was filed in April of  
2           2020. I believe it was on April 24, 2020. And these motions  
3           weren't filed until August or September. So, your Honor, I  
4           think that Mr. Ernst, in waiting for such a long time, filed  
5           the motions at his peril that the Court may or may not take up  
6           the motions for intervention until -- until after it determines  
7           the previously filed motion for class certification.

8           THE COURT: So you're saying that the motions were  
9           decided in the order in which they were filed, and therefore,  
10          the fact that argument took place after a decision on one  
11          shouldn't make any difference; is that what you're saying?

12          MR. ROSENFELD: That's -- that's what I'm saying, in  
13          effect.

14          THE COURT: All right.

15          MR. ROSENFELD: That he -- he filed -- if he was so  
16          concerned, he should have filed it earlier.

17          Now, I think -- I think that that motion has lots of  
18          issues on its own outside of China Agritech, as we have raised  
19          in our opposition brief. It has timeliness issues, it has  
20          prejudice issues, you know, it has a number of issues which are  
21          raised in the brief and which I can go through. But I think  
22          once the Court decides -- the important thing is, once the  
23          Court decides class certification, which it has, the Court --  
24          the Court is right, the case is stripped of its class action  
25          status. It is an individual case.

1           And what we can analyze, the effect of the  
2           intervention on the individual claims and whether those  
3           individual claims should be inter -- you know, should be dealt  
4           with on a consolidated basis versus an individual action, but  
5           under China Agritech the Court cannot then deal with a -- as  
6           the -- I guess as they put it, a renewed motion or a new motion  
7           for class certification, because what that would do, if the  
8           Court were to permit leave for the plaintiffs to file some sort  
9           of renewed motion for class certification with new plaintiffs,  
10          with new class definition, with new theories, with -- maybe  
11          with -- even with new counsel who alleges -- who makes a  
12          different argument, that -- that basically takes that China  
13          Agritech decision, which was decided for a very particular  
14          policy purpose to prevent these ongoing, everlasting class  
15          motions, and it creates a loophole that really swallows the --  
16          swallows the rule as a whole and really contradicts the --  
17          what the Supreme Court was looking for.

18                 So I think that the analysis with respect to China  
19          Agritech is just as valid with respect to Ms. Colvin and  
20          Mr. Bell as it is with Ms. Heathcote. All of them are  
21          precluded from bringing class claims.

22                 Now, they still have remedies, as the Court  
23          recognized. We don't deny that they have remedies, that they  
24          have -- they can bring an individual claim. We do seek to  
25          prevent them from intervening here because we think that,

1 number one, it's untimely as set forth by, you know, the Sixth  
2 Circuit rules. We went through it at length in the brief. I  
3 don't -- I'm not going to repeat all that rationale, but the  
4 case is four years old. We have gone through a lot of  
5 discovery.

6 But I think what's important here is that by letting  
7 them intervene here it would greatly prejudice CSG, and it  
8 would prejudice CSG because CSG is entitled to finality in this  
9 case. CSG is entitled to have the cloud that's been hanging  
10 over its head finally adjudicated.

11 And what intervention of the individual claims in this  
12 case would do is it would take those -- this case, which has  
13 already been pending for nearly four years now, and it would  
14 delay it a minimum of six to nine months because we would need  
15 to do additional written discovery, we would need to resubpoena  
16 the State with regard to the new plaintiffs, we would need to  
17 take additional depositions, we would need to refile motions  
18 for summary judgment, and I don't know what else would be  
19 filed. I mean, this would be a substantial, maybe nine-month  
20 delay, at least, to resolve these issues. This case --

21 THE COURT: Mr. Rosenfeld, let me ask you to stand by  
22 a minute. I have to go silence another computer. Just take  
23 two seconds here.

24 MR. ROSENFELD: Absolutely, your Honor.

25 (Pause in the proceedings at 3:59 p.m.)

1 THE COURT: All right. Sorry about that. I am, like  
2 you, dealing with the wonders of technology here.

3 Go ahead.

4 MR. ROSENFELD: I understand, your Honor. I was in  
5 the middle of an oral argument the other day and my computer  
6 froze for about five minutes and a colleague of mine had to  
7 take it on, so I understand the technology.

8 THE COURT: Well, you know, I would rather have these  
9 proceedings in person. I think all of us would, except perhaps  
10 Mr. Stidham, but this is -- this is sort of a distant second  
11 best, I think. But maybe for purposes of these arguments,  
12 it's not so bad.

13 Anyway, go ahead and wrap it up, Mr. Rosenfeld. I  
14 understand your position.

15 MR. ROSENFELD: Sure. Sure.

16 So, your Honor, you know, the prejudice obviously is  
17 why numerous courts have denied intervention as of right and  
18 permissive intervention when parties have stood on the  
19 sidelines.

20 And I -- we cite the Stupak Thrall case that the Sixth  
21 Circuit decided where they denied intervention filed after the  
22 close of extensive discovery on the eve of filing dispositive  
23 motions. And we cite -- we also cited in our brief your case,  
24 the Coalition to Defend Affirmative Action, where this Court  
25 denied a motion to intervene by a late attempted intervenor who

1 had been aware of the case throughout but waited until after  
2 discovery and the filing of the dispositive motions.

3 And you know, as the Sixth Circuit emphasized in the  
4 Michigan Association for Retarded Citizens case, which we cite  
5 in our brief, untimely motions like those of the movants here  
6 must be denied.

7 So I guess, your Honor, I will leave it at that. I  
8 think that our position is that China Agritech bars the only  
9 claims that the plaintiffs seek to make here.

10 And I will note one other quick thing on the issue of  
11 whether -- of how you should deal with the motions that were  
12 filed before the argument on class certification but were filed  
13 after the class cert motion.

14 It's interesting that Mr. Ernst never raised, during  
15 the class certification motion, that he believed it was  
16 imperative that those motions get decided beforehand. He  
17 never stated that he thought that the original representative  
18 plaintiffs were inadequate and should be -- and that his motion  
19 should be stayed pending resolution of this issue, nor did he  
20 seek reconsideration after your Honor made the ruling on that  
21 basis.

22 So I believe for all those reasons, in addition to the  
23 reasons that I raised earlier, China Agritech clearly applies.  
24 It applies to bar any class claims. And to the extent that the  
25 Court is looking at intervention beyond China Agritech even on



1 an individual basis, we believe for the reasons set forth in  
2 our brief, the motions -- the movants' motions are untimely and  
3 should be precluded on that basis and they should, if they --  
4 if they deem appropriate, file individual actions.

5 Thank you.

6 THE COURT: Thank you, Mr. Rosenfeld.

7 Ms. Taylor?

8 MS. TAYLOR: Thank you, your Honor.

9 Much of what I was going to argue has already been  
10 discussed, so I think I'm just going to limit my area of  
11 discussion just to a couple of quick points, and that is, that  
12 the futility issue, I think, is huge here. If they are seeking  
13 to intervene in the class, they still have the problem that the  
14 Court determined that there needs to be claimant-specific  
15 answers to a number of questions.

16 While Mr. Blanchard points out that he has got this  
17 evidence that's attached to his motion and it establishes that  
18 his client was auto adjudicated and she was reversed, there's  
19 still some inherent problems in all of this, and one being, as  
20 the Court pointed out in its order denying class certification,  
21 that the pivotal issue in a due process claim is whether or not  
22 the UI furnished adequate process through MiDAS at all of these  
23 stages. That's necessary to determine liability for class  
24 members. That's still a big issue here.

25 So no matter what's attached to these motions, there

1 still are all these questions that we have to ask specifically  
2 Ms. Heathcote. She was timely in her appeal. So while she  
3 claims she didn't receive notices, she was able to file an  
4 appeal and get before an ALJ, request a hearing before an ALJ  
5 within six days of the date of her determination. So she  
6 received the determination based upon her appellate process  
7 taking place for her. So defendant --

8 THE COURT: Actually, she won the appeal, didn't she?

9 MS. TAYLOR: She did, your Honor. And she did. But  
10 the point in all this is, she wants to say she didn't receive  
11 the factfinding, so therefore, she was adjudicated because she  
12 did not respond to factfinding.

13 That's questionable when you think, well, the same  
14 address is on the factfinding as is on the determination. If  
15 she received the determination one must question why she's  
16 claiming that she didn't receive the factfinding. So again,  
17 the question --

18 THE COURT: Well, that's sort of a -- that's sort of a  
19 merits argument, really. I mean, but how does that have any  
20 bearing on the intervention issue?

21 MS. TAYLOR: Because it goes to the futility issue,  
22 your Honor, I believe.

23 THE COURT: Oh, futility. Okay. All right.

24 MS. TAYLOR: Right? So as you pointed out, we still  
25 have a superiority issue because of all these individual

1 claimant answers that are required, no matter who is seeking to  
2 intervene.

3 And number two, I do note that in the reply for  
4 Heathcote, Mr. Blanchard noted that the only question here  
5 was whether or not she was -- Ms. Heathcote was perfunctorily  
6 accused and adjudicated of fraud without any evidence. He  
7 believes that's the only question with respect to his request  
8 for intervention.

9 And again, as I pointed out, there is a number of  
10 other questions, but today I heard that it seems to me that  
11 he is also advocating that to intervene she would become the  
12 class representative for this particular class. But his reply  
13 indicates that that's not what he is asking for. So I'm kind  
14 of uncertain as to really what the position is there for  
15 Ms. Heathcote.

16 But it seems to me that in order to -- for Mr.  
17 Blanchard to state what he has in his reply, she certainly is  
18 seeking to become the class representative for this small class  
19 of individuals that the Court indicated could possibly be  
20 appropriate for class certification.

21 So -- and I think in that regard, again, we go back to  
22 the superiority issue. She just can't overcome the problems  
23 that the Court pointed out.

24 Same thing for Bell and Colvin. I think they have the  
25 same issue, particularly Ms. Colvin. She complains that she

1 didn't receive the factfinding, but it was sent five months  
2 after she stopped receiving benefits. So there again, you have  
3 a question of, did she truly not receive this or is this simply  
4 based upon her neglect?

5 So I think for those reasons, your Honor, and  
6 everything that we have stated in our brief, I believe that  
7 these requests to intervene should be denied.

8 Unless the Court has any other questions, I'm not  
9 going to repeat what's already been stated.

10 THE COURT: Thank you, Ms. Taylor. I appreciate that.  
11 No, I have no additional questions.

12 MS. TAYLOR: Thank you, your Honor.

13 THE COURT: Ms. Pendrick, would you like to present  
14 any additional argument? I understand both you and Ms. Taylor  
15 represent State defendants, but they are different, so you have  
16 a right to go ahead and present, if you would like.

17 MS. PENDRICK: Thank you, your Honor. We do represent  
18 different clients, but given that I am the fourth in line of  
19 the defendants arguing, I think everything that I was going to  
20 say has been addressed. I won't waste the Court's time with  
21 any more argument unless it has questions.

22 THE COURT: Thank you, Ms. Pendrick.

23 I will take, I guess, a point of privilege here and  
24 tell you that I was in a criminal trial before Judge DeMascio  
25 many, many years ago and one of my co-defendants had to present

1 his -- counsel for one of the co-defendants, co-counsel had to  
2 present a closing argument after seven other defense attorneys,  
3 including me, had already presented, and he started off  
4 explaining to Judge DeMascio that he felt like Zsa Zsa Gabor's  
5 seventh husband. He said he knew what he had to do, he just  
6 didn't know how to make it interesting. And Judge DeMascio  
7 did not take kindly to that, but times have changed.

8 In any event, I appreciate that.

9 Let's go in reverse order here. Mr. Blanchard and  
10 then Mr. Ernst.

11 MR. BLANCHARD: Thank you, your Honor.

12 So to go in reverse order, maybe take the last  
13 question raised about the policy of American Pipe first here.

14 I think what we do agree with counsel on the other  
15 side is that American Pipe and China Agritech do come out of  
16 policy preferences. They are driven by policy preferences  
17 and -- but yet there is a distinction in that American Pipe  
18 policy preference is precisely because there are certain cases  
19 where you do want potential intervenors, potential other  
20 plaintiffs to sit by the sidelines, so to speak, as defendants  
21 say.

22 The policy that American Pipe is indoctrinating there  
23 is really that you want people to stand down while a class is  
24 being adjudicated and not rush.

25 And the policy in China Agritech, I agree, is that we

1 do not want to see successive actions, one filed after another,  
2 and the defendant, after one class action is denied, the  
3 defendant is sued again in other case in another court and is  
4 subject to discovery all over again on the same claims. That  
5 makes sense. From a policy perspective, that makes sense. But  
6 that is --

7 THE COURT: Well, how is that any different than a  
8 person who is a putative class member, class certification is  
9 denied, and then the putative class member wants to step up as  
10 a class representative and try again?

11 MR. BLANCHARD: Well, it's different in a couple of  
12 ways.

13 One, we're talking about a pending case where the work  
14 is already before your Honor. You're aware of the case. Not  
15 just that it's pending, but there is a lot of discretion that  
16 the Court has.

17 Obviously, as we've talked about, the Court may not  
18 want to entertain renewed class certification motions. The  
19 Court may decide that's inappropriate or futile even.

20 THE COURT: Well, during the -- during the interregnum  
21 there, while others were arguing, you haven't found a  
22 procedural rule that lets you take another crack at this,  
23 have you?

24 MR. BLANCHARD: I'm sorry, I was just about to do that  
25 and then you called me out first. I did want to focus on those

1 other arguments.

2 THE COURT: No, I will acknowledge, 54(b) says that  
3 until there is a final judgment I can revisit any interlocutory  
4 order that I have entered in the case, but that's different  
5 than -- that speaks to the authority of the Court. That's  
6 different than a rule that -- for example, Rule 60(b) or  
7 something like that that provides a party with the opportunity  
8 to seek reconsideration.

9 And that, that's what I don't see here, particularly  
10 where we have a local rule under 7.1(g) or (h), I forget which  
11 it is, that limits reconsideration to application within  
12 14 days.

13 So I'm not sure where you're going to go with that,  
14 Mr. Blanchard, but I guess that's sort of rhetorical. It's not  
15 so much of a question. I have interrupted your rebuttal  
16 argument, so go ahead.

17 MR. BLANCHARD: That's fine, your Honor.

18 I do think what I -- why you brought that up, I think,  
19 is because I was going through the point that this is a matter  
20 that we're relying very much on the discretion of the Court,  
21 not just in whether there would be leave to file a renewed  
22 motion or a renewed complaint as to class action, but whether  
23 there would be additional -- you know, defendants talk about  
24 the prejudice, whether there would be additional discovery, how  
25 much discovery.

1           We think -- along with Mr. Ernst, we think it would be  
2           very minimal. We are just talking about files here and one to  
3           two depositions that I could take in a single day.

4           THE COURT: Yeah, but there's more to it than that,  
5           Mr. Blanchard. I don't mean to keep engaging you on this, but  
6           if you're in the defendants' shoes, what they are going to  
7           say or what they have said is that they are at a tremendous  
8           disadvantage because they have engaged in discovery, they  
9           have litigated this question, they have laid their cards on  
10          the table with respect to class certification, I have pointed  
11          out the defects, and now as a new person on the block you can  
12          come forward with all of that information, address those  
13          defects, and try again. That's the prejudice I think they  
14          are referring to.

15          MR. BLANCHARD: Well, I don't think that is an undue  
16          prejudice, your Honor. I don't think it's an undue prejudice,  
17          because I think the work here has been done and is not -- the  
18          work and the effort and the analysis and the so-called cards  
19          that defendants put on the table really relate to liability,  
20          causation, bigger picture issues that would be exactly the  
21          same for Ms. Heathcote or any other intervenor here.

22          THE COURT: All right.

23          MR. BLANCHARD: So as I was saying with American Pipe,  
24          it's one thing to say under China Agritech that the policies,  
25          we don't want successive class actions, but what defendants are



1 arguing for is a policy that would undermine American Pipe.

2           What this would mean is that Heathcote, intervenors,  
3 others like that would actually have to rush to file competing  
4 class actions, really, up front within the statute of  
5 limitations in the -- out of concern that one class action  
6 might not have an adequate class representative.

7           And it's actually -- to interpret China Agritech in  
8 this broad policy way is contrary to the policy of American  
9 Pipe. What we're saying, what you would be saying is,  
10 Heathcote should have filed this a couple of years ago and sat  
11 back and had a competing class action or somehow stayed it and  
12 waited until the adequacy issue was determined in this class  
13 action.

14           And yes, not just the adequacy issue, I'll address  
15 that in a minute, the futility arguments there, but I do think  
16 what defendants are pushing is actually contrary to the  
17 American Pipe policy and contrary to the dictates of American  
18 Pipe that says a timely motion to intervene should be filed  
19 after class certification is decided.

20           And that doesn't say anything as to whether the Court,  
21 in its discretion, with a lot of discretion as to how discovery  
22 would proceed, how many depositions, if any, would be granted,  
23 what pleadings would be revisited, whether any of the summary  
24 judgment pleadings would be revisited, those are all  
25 hypotheticals that defendants put out there and say, well,

1       there could be a lot of prejudice.

2               But the Court has inherent authority to manage its  
3       docket and decide all those questions in a way that's fair to  
4       everybody, including Ms. Heathcote and the thousands of people  
5       like her that were affected by what I think almost everybody  
6       agrees was a constitutional violation here.

7               And the question is, can it be adjudicated as a group?  
8       So to move on to that question that's been talked about as a  
9       futility argument or superiority and predominance argument,  
10      exactly what I am talking about is that Ms. Heathcote's claim  
11      as to the class we're talking about here would satisfy those --  
12      those concerns of the Court as well, because of the -- because  
13      it was all batched, because we're talking about somebody --  
14      that the computer was programmed to make false information  
15      about weekly earnings and then to accuse somebody of fraud  
16      based on that. There really isn't a lot of other analysis that  
17      goes in there.

18              And Ms. Taylor raises this issue of whether there was  
19      notice of the questionnaire and she didn't respond to it. It's  
20      irrelevant whether somebody responded to the questionnaire.

21              One, they didn't have to.

22              Two, they were told in the questionnaire that a  
23      decision would be made based on available evidence, not that  
24      the machine would create false evidence and a decision would be  
25      made based on that. They were told that a decision would be

1 made based on the evidence, not that you would be defaulted to  
2 guilty of fraud if you don't answer the questionnaire.

3 Three, the questionnaire explicitly says there are  
4 criminal penalties that are associated with fraud and with a  
5 false statement on this questionnaire.

6 There is a -- there is a protection against  
7 self-incrimination that is implied here. No court, not even  
8 the agency, has ever suggested that there is a requirement to  
9 respond to the questionnaire.

10 And so that's the class of people that Heathcote  
11 seeks to represent. It's irrelevant whether they got the  
12 questionnaire, didn't get the questionnaire, were able to,  
13 you know, appeal in time or not.

14 It violates procedural due process in the same way if  
15 you said, well, if somebody is accused of a misdemeanor we're  
16 just going to assume you're guilty. And if you can appeal in  
17 time, that can be corrected, that's -- that's fine, that's --  
18 that's within your due process rights. That's just not the way  
19 our constitutional system works here.

20 So we know there is a violation. We know there is a  
21 commonality. In this case, as to the group that I'm talking  
22 about, there is superiority. And there would be injustice that  
23 would be done if we couldn't build on the work that's already  
24 here and adjudicate these claims as a group.

25 As to any of the burden that we're talking about, that

1 is within the discretion of the Court to manage its docket, to  
2 manage discovery, and --

3 THE COURT: Mr. Blanchard, you're repeating yourself.

4 MR. BLANCHARD: I am. I was just trying to make it  
5 into a summary, but I'll just leave it right there. I repeated  
6 myself.

7 So thank you for listening. I do believe the best  
8 way to proceed is as a group. I do believe that there are  
9 mechanisms to address a renewed motion for class certification,  
10 and I appreciate your Honor's time today.

11 THE COURT: Thank you for your presentation,  
12 Mr. Blanchard.

13 And so we will end where we began with Mr. Ernst.

14 MR. ERNST: Thank you, your Honor.

15 Your Honor, I think everybody would have to agree that  
16 if the Court decided the motion to intervene before the motion  
17 for class cert, then China Ag would not apply.

18 So what the defendants urge is that we have this kind  
19 of arbitrary decisionmaking process by which even though the  
20 plaintiffs filed their motions or the potential intervenors  
21 filed their motions to intervene prior to a decision being  
22 made, that because the Court decided the class cert motion  
23 previous to the motions to intervene, then now China Ag applies  
24 and the claims cannot be brought as they are barred by the  
25 statute of limitations.

1           The same can be said about the sequence in which the  
2 motions are filed. It's just arbitrary that if the class  
3 cert motion was filed before the motion to intervene, then  
4 it's necessarily going to get decided before the motion to  
5 intervene. That's not true, for one thing. The Court can  
6 decide the motions in any order it wants.

7           But it just seems to be a real arbitrary process,  
8 instead of an essentially bright-line rule that says if you  
9 file your motion to intervene before the class cert motion is  
10 decided, then you get the tolling provisions of American Pipe.  
11 And nothing -- nothing in China Ag prevents that from  
12 happening.

13           And also, I would note that if you have that type of  
14 bright-line rule, that assuages all the concerns about the  
15 cases dragging on for ten years and one after another  
16 successive class actions, because all the motions to intervene  
17 have to be filed before the first determination of the class  
18 action -- of the motion for class certification, I should say.

19           So I think that everybody has to admit that this is --  
20 that China Ag wouldn't apply if the Court had only decided  
21 these motions first and so it just becomes arbitrary.

22           Second, I would like to point out that in this case  
23 plaintiffs filed their motion for class cert in April, I  
24 believe, and then in May that's when the defendants filed their  
25 12(b)(1). And at that point, the intervenor's interests are

1 put into jeopardy to some extent. And the -- it's true that  
2 CSG --

3 THE COURT: Mr. Ernst, weren't those issues raised in  
4 the affirmative defenses?

5 MR. ERNST: I was just getting to that. CSG raised  
6 the -- raised the real party interest in their affirmative  
7 defense. That's the only one that did it, the only defendant  
8 that raised it.

9 But your Honor, defendants raise affirmative defenses  
10 all the time in their -- in their responses, first responsive  
11 pleadings, so they don't waive them. And many times, many  
12 times the motions are not brought. And the reason is,  
13 sometimes, anyways, they don't want to bring the motions  
14 because they want to go up against certain plaintiffs so they  
15 can choose the plaintiffs they want.

16 So the fact that they raise -- that they raise it in  
17 their affirmative defenses doesn't put an intervenor on notice  
18 that the claim might be dismissed. What puts them on notice  
19 is the actual motion that's filed, and that wasn't filed for  
20 three years after, even though all the facts and all the  
21 circumstances that supported the motion were known almost  
22 immediately. They were known in the -- they were known from  
23 the complaint where the plaintiffs admitted that they filed  
24 bankruptcy proceedings. So that three years delay is  
25 attributed to the defendants who waited that long to file it.

1           THE COURT: Well, you know, Mr. Ernst, I'm not  
2 following that part. If it was known to them, it certainly was  
3 known to you. As you say, it was pleaded in the complaint. So  
4 I would think that even going in, when you were signing up the  
5 plaintiffs, you would have detected that maybe there were some  
6 warts that you had to address and found someone else to proceed  
7 with.

8           MR. ERNST: That's -- that's potentially true, your  
9 Honor, but it's -- the intervenors didn't know of it.

10          THE COURT: Oh, all right. I get your point.  
11          How do you deal with the case that charges the  
12 intervenors with the same knowledge because they have common  
13 counsel?

14          MR. ERNST: I -- I have not seen that case, your  
15 Honor, and I disagree that they have -- they are charged with  
16 any knowledge before, before they are represented by counsel.  
17 That just would seem grossly unfair.

18          THE COURT: All right.

19          MR. ERNST: In any event, your Honor, what else I  
20 would like to say about China Ag is that I think Mr. Stidham  
21 argued that there were no carveouts or no -- that China Ag made  
22 no distinction regarding intervenors.

23          Well, that's because that issue was not before the  
24 Supreme Court, and the Supreme Court generally decides only  
25 the issues before it. So it didn't carve out an exception for

1 intervenors because there were no intervenors in the case.  
2 And it didn't distinguish -- it didn't fail to distinguish  
3 intervenors who filed before the motion for class cert because  
4 there were no such litigants before it and no such arguments  
5 made before it. So the fact that it's silent on the issue does  
6 not mean that it decided that in any way.

7 And once again, China Ag simply does not deal with  
8 this precise issue, which is, can a person intervene before  
9 the class action is -- before the class certification motion is  
10 decided and that subsequently represent the class when they  
11 would be otherwise qualified.

12 And there are some -- there is one other point I would  
13 like to make is, there was argument that the Court determined  
14 that these particular plaintiffs were not sufficient to  
15 represent the class for various reasons, but with respect to  
16 the bankruptcy defendants, the Court indicated that those  
17 defendants did seem qualified at first glance until they looked  
18 at the bankruptcy issue, and that's what essentially  
19 disqualified them.

20 And so these intervenors stand in those shoes, but  
21 they don't have the bankruptcy issue. So they are -- they  
22 would be qualified to represent the class representatives, the  
23 putative class members here with regard to that specific type  
24 of claim that the Court identified as potentially well served  
25 by class status, which is, they failed to answer their



1 questionnaire and they had an auto adjudication of fraud based  
2 on the failure to answer.

3 And that was how the system was set up, that's how it  
4 was programmed, is if they didn't answer, if the claimant  
5 didn't answer within a given amount of time, it automatically  
6 found them guilty of fraud. And so that's the class that these  
7 potential intervenors would represent.

8 And the Court noted that that was a legitimate class  
9 that could be represented in this case, but that the plaintiffs  
10 herein could not represent that putative class because of their  
11 bankruptcy issues which created these affirmative defenses  
12 that, as the Court noted, took up a lot of litigation.

13 So we -- these other intervenors don't have that  
14 problem and would be qualified to represent the class.

15 Your Honor, before I forget, I do have that Westlaw  
16 cite.

17 THE COURT: I was just about to ask you for that. Go  
18 ahead.

19 MR. ERNST: It's 2002 WL 33934282.

20 THE COURT: All right. Thank you very much. I  
21 appreciate your presentations. The motions are submitted.  
22 I will get you a written decision shortly.

23 I have several motions on this case under advisement,  
24 and I hope to -- I don't think I should commit to this in  
25 public, but I will anyway. I hope to have them all decided by

1 the end of the month.

2 So if there is nothing further, then, I will recess  
3 this session of court.

4 I would like my staff to say on the call here and I  
5 will excuse everyone else. I hope you all stay well.

6 (Proceedings adjourned at 4:29 p.m.)

7 \* \* \*

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10 CERTIFICATE OF COURT REPORTER

11

12 I certify that the foregoing is a correct transcript  
13 from the record of proceedings in the above-entitled matter.

14

15 s/ Rene L. Twedt  
16 RENE L. TWEDT, CSR-2907, RDR, CRR, CRC  
Federal Official Court Reporter

July 28, 2021  
Date

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